In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 788

Supreme Court, U.S.
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ESTELLA LATTA, JONES M. GRIFFIN and ALVIN CHAMBERS,

Petitioners,

vs.

WESTERN INVESTMENT COMPANY (a corporation), et al.,

Respondents.

Respondent's Brief in Opposition to Petition for Certiorari

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Respondent's Brief in Opposition to Petition for Certiorari

Come now respondents, appellees below, and submit the following brief in opposition to the petition for a writ of certiorari herein. The decision of the Court below is reported in 173 F.2d 99.

STATEMENT OF THE CASE

On May 2, 1947, petitioners as plaintiffs filed a complaint in the District Court for the Northern District of California (R. 2-48) allegedly appearing for themselves and other descendants of brothers and sisters of Mark Hopkins, deceased (R. 3), attacking the decree of distribu-

tion in the *Estate of Mark Hopkins, Deceased,* entered November 1, 1883 *(about 66 year ago)* in the Superior Court of the State of California, in and for the City and County of San Francisco (R. 49-53, also R. 144-150). Mark Hopkins, a resident of California, died intestate on March 29, 1878 (R. 5).

Motions to dismiss were filed in the District Court by the various respondents (R. 82-90 and 180-184) and, after hearing, motions to dismiss were granted on April 27, 1948 (R. 196-197).

Petitioners thereupon appealed to the United States Court of Appeals for the Ninth Circuit and, after hearing, an opinion was filed on February 25, 1949, and a judgment entered (R. 210-229), affirming the dismissal of the suit by the District Court (R. 229). *Latta v. Western Investment Co.,* 173 F.2d 99.

The United States Court of Appeals issued its mandate accordingly and forwarded the same to the District Court on March 29, 1949.

I.

None of the Circumstances Which Might Justify Certiorari Are Present Here

Jurisdiction to bring up cases by certiorari from the Court of Appeals was not conferred upon the Supreme Court merely for the purpose of giving the defeated party in the Court of Appeals another hearing on the merits. That is what petitioners appear to be seeking in this case.

The main purposes of certiorari to the United States Court of Appeals are (a) to secure uniformity of decision among the Federal courts, and (b) to bring up cases involving questions of importance which it is in the public

interest to have decided by the Supreme Court as the court of last resort.

The discretionary power of the Supreme Court was not intended to be exercised in every case where lower Federal courts have adjudicated conflicting claims of the parties or merely for the purpose of examining the correctness of the result. *Magnum v. Coty*, 262 U.S. 159, 67 L.ed. 922, 43 Supp. Ct. 531; *Deputy v. DuPont*, 308 U.S. 488, 84 L.ed. 416, 60 S.Ct. 363.

In the present case there is no conflict in decision among the Federal Courts. No such conflict is asserted by petitioners among the alleged reasons for a review of this case by the Supreme Court (petition, pp. 13-27). On the contrary, the decision of the Court below is in harmony with its previous decision in *Freeman v. Hopkins*, 32 F.2d 756, which involved substantially the same principles of law. A petition for certiorari was denied in that case, 280 U.S. 575.

Nor is there any important or novel principle of law involved in this case. Petitioners (plaintiffs in the District Court), after a delay of some 64 years, sought to attack a decree of final distribution entered by the State Court, sitting in probate, in 1883, which settled the Estate of Mark Hopkins, deceased. Such probate proceedings are proceedings in rem. The record shows that petitioners had knowledge of the situation of which they complain for over twenty years before they commenced this suit, in fact since 1925 (R. 191 et seq., also R. 139, par. 25). The Court below so found, stating, 173 F.2d at p. 107 (R. 227, 8):

> "The alleged fraud was completed upon the granting of the decree of distribution in 1883, and as here-

tofore pointed out, the appellants have had actual knowledge of the alleged fraud herein complained for over twenty years. Time, death and destruction by fire have blotted out the events of that period beyond the restoration of the living. It is not only a closed chapter but a sealed chapter in the lives of those involved. The burned records cannot be restored. The dead cannot be resurrected. The fortune accumulated by Mark Hopkins long ago passed through and into many hands, far removed from the generation in which he lived. To attempt to disentangle this estate would be unjust and inequitable. Equity frowns upon stale demands. Equity declines to aid those who have slept on their rights. The appellants' alleged claims long ago were lost by reason of gross laches."

There is no new or important principle of law established by the foregoing statement in the decision of the Court below. The decision is in accordance with the law of the highest court of the State of California. *Del Campo v. Camarillo,* 154 Cal. 647 at 657, 98 Pac. 1049 at 1054. 10 Cal. Juris. 555. And the decision is in accordance with established principles long recognized by this Court. *Hammond v. Hopkins,* 143 U.S. 224, 12 S.Ct. 418, 36 L.ed. 134. None of the situations mentioned in Rule 38, par. 5, which might warrant the issuance of a writ of certiorari is present here.

II.

Petitioners' Belated Attack Upon the Acts of the Administrator Because of His Alleged Disqualification Is Groundless and Presents No Novel Question of General or Public Importance.

The first reason assigned by petitioners as justification for the issuance of certiorari in this case is that all of the acts of Moses Hopkins as administrator were void because

of his alleged disqualification. On this point the lower court said (173 F.2d 104):

> "The pleadings recognize the appointment of Moses Hopkins as administrator. Upon his appointment the letters of administration issued to him became conclusive evidence of his qualification and authority to act and the regularity of the proceedings leading up to his appointment. They may be attacked only in direct proceedings and not collaterally."

The foregoing statement is not in conflict with the decisions of any court of the State of California or of any other Federal Court. It conforms with the State law to the effect that if an administrator is appointed who is for any reason disqualified, the State probate court may suspend the powers of the administrator or may revoke his appointment (Cal. Probate Code Sec. 521, formerly Sec. 1436 Code of Civil Procedure); but that in the meantime, before his powers are suspended or his appointment revoked, his acts are valid (Cal. Probate Code Sec. 525[1] formerly Sec. 1428 Code of Civil Procedure).

It would make no difference whether this attack upon the acts of such administrator is direct or collateral.[2]

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1. Sec. 525 Cal. Probate Code reads:

> "*Acts prior to revocation.* All acts of an executor or administrator, as such, before the revocation of his letters testamentary or of administration, are as valid, to all intents and purposes, as if he continued lawfully to execute the duties of his trust."

2. While this proceeding might be considered a direct attack on the decree of final distribution of the Mark Hopkins estate, this belated attack on the order of court appointing the administrator, and upon his acts as administrator, is clearly a collateral attack. 31 Am. Juris. 204-5.

The courts generally have followed the California statutory rule that even if the administrator were for any reason inelligible for appointment as such, once he was appointed, and until his appointment was revoked, his acts would be valid (2 Bancroft's Probate Practice, Sec. 337, pp. 343-4; also 1 Bancroft's Probate Practice, Sec. 275, p. 525).

Furthermore, if it were a fact that the administrator in the Mark Hopkins estate appointed by the Court in California in 1881, was the same person who had been convicted of an infamous crime in North Carolina in 1845, as alleged by petitioner (R. 81), we can only conclude that he concealed this matter from the probate judge, or gave perjured testimony in support of his appointment. This at the most would be intrinsic rather than extrinsic fraud, and not subject to attack in equity. It is a well recognized principle that only extrinsic, not intrinsic, fraud is a ground for attack upon a court order or judgment after the time for appeal has expired. This principle has been repeatedly recognized by the highest court of the State of California. For example, in the recent case of *Gale v. Witt*, 31 Cal.(2d) 362 at 365, 188 P.(2d) 755 at 757, the Court said:

> " 'The final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic.' (*Westphal v. Westphal*, 20 Cal.2d 393, 397 (126 P.2d 105); *Howard v. Howard*, 27 Cal.2d 319 (163 P.2d 439); *Neblett v. Pacific Mut. Ins. Co.*, 22 Cal.2d 393 (139 P.2d 934); *Olivera v. Grace*, 19 Cal.2d 570 (122 P.2d 564, 140

A.L.R. 1328).) (1) The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination. (*Thompson v. Thompson*, 38 Cal. App. 2d 377 (101 P.2d 160); *Godfrey v. Godfrey*, 30 Cal. App. 2d 370 (86 P.2d 357).) (2) Where the fraud practiced is collateral to and outside of court so that a party is, because of such fraud or concealment, effectively deprived of presenting his case or all of his defense, it is extrinsic and equity will give relief."

Furthermore, there is every presumption of the regularity of the proceedings in the probate court, especially where, as here, the Court records were destroyed in the San Francisco fire of 1906. *Estate of Heywood*, 154 Cal. 312, 97 Pac. 825.

In any event, it is too late to raise the point. If Moses T. Hopkins (alleged to be the same person as Moses Hopkins, the administrator) was convicted of an infamous crime in North Carolina in 1845, that must have been a matter of public record in the home state of petitioners or their ancestors for upwards of 100 years, and no excuse is alleged for their delay in discovering it, or for their failure to follow up the alleged irregularity with reasonable promptness. *Hammond v. Hopkins*, supra.

Thus, there is no novel or important legal question involved in this point; the Court below simply followed the California Code provisions and well established precedents in California and elsewhere many of which were cited by the Court below.[3]

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3. *Latta v. Western Investment Co.*, 173 F.(2d), 99 at p. 104, footnote 9.

III.

Nor Did the Decision of the U. S. Court of Appeals Deal with Any Important Question of Local Law in Any Way in Conflict with Applicable Local Decisions with Respect to Laches.

Perhaps the principal issue presented in this case is with respect to laches. Conceding the validity of all of petitioners' allegations of fraud, whether intrinsic or extrinsic, said to have been practiced between the time of the death of Mark Hopkins in 1878 and the decree of final distribution closing his estate in 1883, the record nevertheless shows that petitioners or their ancestors had knowledge of the situation complained of for upwards of 20 years prior to filing of this suit.

While the present suit was commenced in the District Court on May 2, 1947, the record shows clearly that petitioners, or some of them, had knowledge of the situation as far back as 1925. It is so conceded (a) in a petition of Alvin Chambers and Jones Griffin, filed in the State Court in San Francisco (R. 126-142, particularly 139, par. 25), (b) in an affidavit of petitioner Latta, filed in the same court (R. 163-166) and (c) in an affidavit of Jones M. Griffin, filed in the District Court in this case (R. 191-196). Furthermore petitioners or their ancestors showed that they had knowledge of the situation on February 27, 1927, when they filed the case of *Freeman v. Hopkins*, supra, in the District Court, which was also dismissed on the ground of laches, and the dismissal affirmed on appeal. The court below took judicial notice of its record in that case (R. 215, also 173 Fed. 2d at p. 103).

As petitioners' attack in 1927 on the probate proceedings in the Mark Hopkins Estate was held barred by laches

in *Freeman v. Hopkins*, supra, it follows that the validity of the defense of laches must be still more apparent at this late date.

In the foregoing circumstances the Court below properly found petitioners' allegation that they first discovered the alleged fraud in 1945 as false, stating (R. 226) 173 F.2d at 107:

> "The allegation of the first discovery in 1945 is plainly false. It was made in the attempt to evade the statute of limitations, the charge of laches, and fully justifies and demonstrates the feasibility of the procedure followed in this case."

The decision of the Court below is precisely in accordance with well established principles applied by the highest court of California, and by this Court, that when one seeks relief against a judgment rendered many years before on the ground of fraud the plaintiff must in its complaint set up facts showing that he has used due diligence and is not guilty of laches. For illustration, in *Del Campo v. Camarillo*, 154 Cal. 647 at 657, 98 Pac. 1049 at 1054, the Supreme Sourt of California said:

> "* * * In seeking relief against the effects of frauds occurring so long ago, and in asking a court to cancel the contract and deed, which, in itself, implies a settlement of the wrongs inflicted by those frauds, the plaintiffs are required to allege a clear case and to prove it by satisfactory and convincing evidence. They must clearly show that they did not discover the existence or commission of the alleged frauds until within a reasonable time before the action was begun, that they proceeded promptly upon such discovery, and that their failure to make the discovery sooner

was not due to their own lack of diligence. *All this must be shown, not merely by a bare statement of the conclusions as we have stated them, but by a detailed statement of the facts and circumstances which caused the ignorance, which prevented an earlier discovery,* and which constitute the diligence in seeking a discovery, including also a statement of all facts previously known to them tending to indicate the existence of the frauds." (Emphasis ours)

The rule also is well stated in California Jurisprudence Vol. 10, p. 555, Equity Sec. 92, as follows:

"When a complaint for equitable relief shows great lapse of time without the assertion of any claim, and long-continued acquiescence in acts hostile to the claim, the *complainant must allege circumstances showing good faith and reasonable diligence on his part.* The complaint will be construed most strongly against the pleader, and if circumstances that might excuse the delay are not alleged, it will be presumed that they do not exist. *After a great lapse of time and the death of the original parties equity, for the peace of society, scrutinizes with great particularity bills founded on an alleged belated discovery of facts, and is not satisfied to retain one unless the fullest possible credible showing is made by the applicant for relief. It is not sufficient merely to allege ignorance of rights at one time and discovery at another.* The facts and circumstances must themselves be pleaded in order that the court may determine whether the sources of knowledge at last availed of were not at all times open to plaintiff, whether they were negligently overlooked, whether other circumstances should not earlier have put plaintiff upon discovery, and what was the nature of the concealment practiced.

Where relief is sought in equity against frauds occurring years prior to the suit, the plaintiff must allege in detail facts and circumstances showing that he did not discover it until within a reasonable time before suing, that he proceeded promptly on making the discovery, and that his failure to make it sooner was not due to his own negligence." (Emphasis ours)

Thus, the decision of the court below was not in any way in conflict with applicable local decisions—it simply followed precedents long established not only by the local courts in Califronia but by the courts generally. *Hammond v. Hopkins*, supra.

IV.

No Constitutional Question Was Raised in the Court Below.

While petitioners assert, among other things (Pet. p. 2, par. 3), as a ground for certiorari that they have been divested of property without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States, no such question was assigned by petitioners among the points relied upon by them on appeal to the U. S. Court of Appeals (R. 199-202), nor was the point urged before the U. S. Court of Appeals or dealt with by it in deciding the case. This alleged ground for review by this Court, raised the first time by the petition for certiorari, should, therefore, be disregarded. *Helvering v. Minn.*, 296 U.S. 378, 80 L.Ed. 284, 56 S.Ct. 269; *Zellerbach v. Helvering*, 293 U.S. 172, 79 L.Ed. 264, 55 S.Ct. 127; *McCullough v. Kammerer*, 323 U.S. 327, 89 L.Ed. 273, 65 S.Ct. 297.

V.

The Court Below Has Decided No Question of Public Importance or of General Interest

The court below, in deciding this case, followed well established precedents in passing upon all of the issues presented by petitioners. No important questions of law were raised which had not been passed upon time and again by the highest court of the State of California, by the Courts generally, and by this Court; and in many instances State statutes control.

True, the case is important to the litigants and their attorneys, but the decision is of no general public interest; there is no question of importance which it is in the public interest to have this Court decide. This alone justifies denial of the petition for certiorari, *Magnum v. Coty*, supra; *Lau Ow Bew v. United States*, 144 U.S. 47, 36 L.Ed. 340, 12 S.Ct. 517; *Hamilton-Brown v. Wolf*, 240 U.S. 251, 60 L.Ed. 629, 36 S.Ct. 269.

VI.

Action of This Court in Denying Certiorari in Freeman v. Hopkins Furnishes a Precedent of the Highest Order

The case of *Freeman v. Hopkins* was filed by some of the same plaintiffs or their ancestors in the District Court in San Francisco on February 27, 1927 (over 20 years before beginning the present suit). In that case the plaintiffs attacked the same decree of final distribution in the *Estate of Mark Hopkins, deceased*, upon the ground of alleged fraud, and endeavored to secure certain assets of the estate from the distributees.

While the *Freeman* case is not *res adjudicata* because the plaintiffs were there attempting to secure other assets

of the estate which had passed to persons other than the defendants herein, the principal issues in that case were substantially the same as in the case at bar, with the exception of the new allegation of the alleged lack of capacity of Moses Hopkins as administrator, which was brought into the present case by an amendment to the complaint filed March 1, 1948 (R. 80, 81) without any explanation of how or when the alleged disqualification (conviction of an infamous crime in 1845, over 100 years ago) had become known to petitioners, or why they delayed bringing up the point until 1948. As we have pointed out (Chapter II, supra), this new point is without merit, for even if the allegations were true, this would not vitiate the acts of the administrator while his letters remained in effect and unrevoked.

As stated above, the *Freeman* case was dismissed by the District Court on the ground of laches, the decision was affirmed by the Circuit Court of Appeals for the Ninth Circuit, 32 F.2d 756, and certiorari was denied by this Court, 280 U.S. 575. By the same token we submit that certiorari should be denied here.

MERITS OF THE CONTROVERSY

Inasmuch as certiorari is not granted for the mere purpose of a re-examination of the correctness of the results in the Court below, or to give the defeated party in the United States Court of Appeals another hearing (*Magnum v. Coty*, supra; *Deputy v. DuPont*, supra), this brief is limited to opposition to the petition for certiorari. It is not prepared as an answer to the major portion of petitioners' brief which reviews in detail the merits of the

case as presented to the Court below. This opposing brief is, therefore, limited to a showing that the United States Court of Appeals decided no novel question of legal importance, no question of general or public interest; and that its decision is in accordance with local law and the decisions of the highest court of the State of California as well as of this Court, and that certiorari should, therefore, be denied.

Respectfully submitted,

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